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NO. _____

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORTHERN CALIFORNIA SUPERMARKETS, INC., PETITIONER

v.

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et. al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Northern California Supermarkets, Inc., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this antitrust case.

OPINIONS BELOW

The opinion of the District Court (App., *infra,* pp. 2a to 22a) is reported at 413 F.Supp. 984. The Court of Appeals affirmed on the basis of the District Court's opinion (App., *infra,* p. *1a).*

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1978 (App., *infra,* p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether an organization composed of vertically integrated agricultural competitors, including multinational corporations, is entitled to antitrust immunity under the Capper-Volstead Act if it performs no significant marketing, processing or handling functions as an entity, and where the only material function of the organization is to fix, set and stabilize the price at which its members individually sell their products.

STATUTES INVOLVED

The Sherman Act, 26 Stat. 209, as amended; 15 U.S.C. § 1, which, in pertinent part, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Section 6 of the Clayton Act, 38 Stat. 731; 15 U.S.C. § 17, is printed in Appendix E, *infra,* p. 25a.

Section 1 of the Capper-Volstead Act, 42 Stat. 388; 7 U.S.C. § 291 is set forth in Appendix C, *infra,* p. 23a.

Section 5 of the Cooperative Marketing Act of 1926, 44 Stat. 803; 7 U.S.C. 455, is set forth in relevant part in Appendix D, *infra,* p. 24a.

STATEMENT

Northern California Supermarkets, Inc. (plaintiff and petitioner) brought this treble damage action on October 23, 1974, charging the Central California Lettuce Producers Cooperative with violations of Section 1 of the Sherman Act. Jurisdiction was based upon Section 4 of the Clayton Act.

Defendants admitted fixing prices, but argued that their actions were immunized from the Antitrust laws by Section 1 of the Capper-Volstead Act, which exempts "farmers [acting] together in associations . . . in collectively processing, preparing for market, handling and marketing [their]" products.

Following preliminary discovery, plaintiff moved for partial summary of judgment on the issue of liability based upon the following facts.[1]

The defendant Cooperative was formed in 1972, but began functioning in May of 1973 with 22 members. The members of the Cooperative shipped over 20 million cartons of lettuce in 1973 and dominated lettuce production in the Salinas-Watsonville-King City area of Central California, accounting for approximately two-thirds of all lettuce shipped from the area. In fact, defendants accounted for over 18% of the total lettuce production in the United States for that year, a year in which California produced over 70% of the nation's lettuce supply.

As an organization, Central has never handled, harvested, shipped or grown lettuce. Central has never negotiated or bargained for its members and has never sold lettuce.

Each member of Central is vertically integrated. Each grows its own lettuce, harvests, packs, cools, markets and ships it. Each deals directly with its own customers, has its own labels and competes with other members of the cooperative for sales.

In every material sense, all Central does is provide a forum for its individual members to fix lettuce prices. In 1973, the year primarily in issue, price fixing was Central's

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[1] R-243, 571. References to the Record on appeal will be designated R-..... References to the transcript of argument on the cross motions for summary judgment are designated Trans. .....

only collective activity.[2] Although a few "Meet our Member" advertisements were placed in a trade paper on a rotational basis, the Cooperative had no full time employees, and no payroll.

By 1974, the activities of the Cooperative had been modestly expanded. One full time employee was added, and the Cooperative began gathering information on subjects like slow paying customers.

Defendants made a cross-motion for summary judgment. Although the defendants emphasized the activities which had occurred during 1974, the 1973 facts as set forth above were essentially undisputed.[3]

Plaintiff argued that in order to be exempt under the Capper-Volstead Act, an agricultural cooperative must perform some activity other than the fixing of prices. Therefore, the 1973 price fixing was without immunity and a violation of Section 1 of the Sherman Act.

As to 1974, plaintiff argued that the other activities of the Cooperative were insignificant and unrelated to the price fixing, which remained Central's primary function. Plaintiff argued that in order to be exempt, price fixing must be a necessary and ancillary incident to some other legitimate marketing function.

Defendants argued that the 1974 activities, taken as a whole, constituted collective marketing within the meaning of the Capper-Volstead Act, and that under the Ninth Circuit ruling in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.) *cert. denied* 419 U.S. 999 (1974), price fixing alone constituted "marketing" within the meaning of Capper-Volstead.

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[2] Clearly, some exchange of market information took place at the price fixing meetings. However, those discussions were informal and ancillary to price fixing. For purposes of this analysis all factual inferences must be resolved in favor of petitioner. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

[3] R-322, 503.

Plaintiff emphasized that if summary judgment were to be entered against it, the Court would have to draw all factual inferences against the Cooperative. From that perspective, the Court would be forced to assume that even in 1974 no significant, or material activity was performed by the Cooperative other than price fixing.

The District Court granted defendants' motion for summary judgment, holding among other things, "mere price fixing is clearly within the ambit of the statutory protection." App. *infra*, p. 18a. Because from the perspective of a defense motion for summary judgment, it must be assumed that plaintiff would prove that even in 1974 no significant other activity occurred, that is the essence of the District Court opinion. The Ninth Circuit affirmed on the basis of Judge Orrick's opinion in the District Court. This Petition for Writ of Certiorari has been filed within 90 days of the entry of that order.

REASONS FOR GRANTING THE WRIT

If plaintiff is correct in its assertions in the District Court, the price fixing activities of the Cooperative resulted in over $20 million in overcharges in 1973 alone. (According to Monterey County Annual Crop Report, 1973, the average lettuce carton brought $3.93 in 1973 up over $1.00 from the prior year.) Although the principle of law which resulted in that overcharge would itself seem to warrant the attention of this Court, the case obviously has broad and far reaching implications beyond the impact of this single cooperative.

As Mr. Justice Stevens recalled in *National Society of Professional Engineers v. United States*, ... U.S. ..... (1978), "Price is the 'central nervous system of the economy.' . . ." ..... U.S. at ..... The Sherman Act, our economic magna charta, "reflects a legislative judgment

that ultimately competition will not only produce lower prices, but also better goods and services." *Id.* at ..... In this case, the Ninth Circuit has ruled, for the first time in the history of the Sherman Act, that large corporate competitors may gather together for the sole purpose of fixing prices and be free from the sanctions imposed by the antitrust laws. Here price fixing has been permitted, and approved, apparently with no objective in mind other than the enhancement of the price of the products produced by these competitors. We believe there to be no comparable case in the history of this Court.

Moreover, the decision places the Ninth Circuit in direct conflict with the articulated position of the United States Department of Justice:

> "[We] . . . read the [Capper-Volstead] Act to cover only associations that actually perform processing, handling and marketing functions. An Association that does not do these things is not a Capper-Volstead association.
>
> * * * *
>
> "We believe [marketing] means something more than simply fixing prices."[4]

Although this Court has held on several occasions that price fixing was legitimate for a Capper-Volstead cooperative, the nature of the exemption has always been articulated in the context of other activities. And in every case in which this Court has addressed price fixing and permitted it, the price fixing has been the necessary and ancillary incident of other legitimate activity. Although this Court has never addressed the issue of naked agricultural price fixing directly, implicit in each prior decision is the requirement that the collective act as an entity for its members and that price fixing be ancillary to and an incident of the collective marketing of agricultural products. *E.g. Maryland and Virginia Milk Producers Association, Inc. v. United States,* 362 U.S. 485, 465-466 (1960).

[4] Address by Keith I. Clearwaters, Deputy Assistant Attorney General, before The Dairy Conference, American Farm Bureau Federation's 56th Annual Meeting, New Orleans, La., Jan. 6, 1975, pp. 5-8.

The decision of the Ninth Circuit takes the first major departure from that reasoning by holding that the cooperative is not required to act as an entity at all and that price fixing, in order to be sanctioned, need not be a necessary or ancillary incident of any other legitimate function, marketing or otherwise. The reconcilliation of this major conflict in the perception of national economic policy is the appropriate function of this Court.

The decision below facilitates anticompetitive enhancement of agricultural prices, apparently without derivative social benefit. It requires no citation to demonstrate that rising prices of food are among the principal problems faced by this economy today.

Petitioner does not challenge the right of Congress to permit naked price fixing among competing corporate farms. Our only argument is that Congress has not permitted such price fixing, and that it is beyond the scope of the judiciary to permit it, particularly where in order to do so the plain meaning of the Capper-Volstead Act must be distorted. At the very least, this Court should undertake its own analysis to determine whether price fixing among these vertically integrated corporate farmers was contemplated by the Congress.

There is no principle of antitrust jurisprudence which has been more clearly taught by this Court in recent years than that competition is to be the regulating standard for this economy. Repeatedly, areas of the economy which had been considered safe harbors, free from competitive

pressures, have had their exemptions stripped or narrowed under the judgments of this Court. The learned professions, once considered exempt, are now competitive.[5] Efforts to expand the protection of the insurance industry failed last term in *St. Paul Fire & Marine Insurance Co. v. Barry,* ..... U.S. ..... (1978). State and local governments all over this country ignored the antitrust laws until this Court's decision in *City of La Fayette v. Louisiana Power and Light Co.,* ..... U.S. ..... (1978). *See also Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976). Common carriers were taught the rules of competition in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972).

The competitive lessons taught by this Court have not been lost on the Congress. Following Chairman Kahn's successful experiments with competition among airlines, last month President Carter signed into law the Airline Deregulation Act of 1978. In the language of the Conference Report, the Act is designed to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services . . . ." And last term, this Court spoke firmly to the agricultural industry in *National Broiler Marketing Association v. United States,* ..... U.S. ..... (1978).

Despite that teaching, the Ninth Circuit has now expanded the Capper-Volstead exemption beyond the scope ever before articulated, and has read into that Act a provision which had been specifically defeated by Congress at the time the Clayton Act was passed. To reach the result, and permit naked price fixing even in the absence of other appropriate activity, the Circuit built upon the

[5] *National Society of Professional Engineers v. United States,* ..... U.S. ..... (1978); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975).

logic of its prior decision in *Treasure Valley, supra.* There, the Court had held that a cooperative which only bargains for its members, without more, was exempt from the Sherman Act. In that case, the cooperative bargained for its members with potato buyers, establishing the price at which individual members would sell. The Ninth Circuit held this price setting function to be immune because price fixing was included within the aggregate concept of "marketing." If the exemption exists for collectively marketing a product, there must also exist a method for the collective to establish the price at which the product will sell.

However, in this case, the Ninth Circuit has taken the last step toward granting farmers unlimited antitrust immunity by defining "price fixing" to *be* "marketing" within the meaning of Capper-Volstead.

Capper-Volstead exempts only the activities of cooperatives in "collectively processing, preparing for market, handling and marketing" agricultural products. Therefore, unless "price fixing" may be defined as "marketing," Capper-Volstead offers no protection. There is simply no support in language or legislative history for the construction given by the Ninth Circuit. And in order to achieve it, the Ninth Circuit also ignored the teaching of this Court in *City of Lafayette, supra,* that there are to be no "implied exclusions" from the antitrust laws. ..... U.S. .....

Last term in *National Broiler Marketing, supra,* Justices White and Stewart joined in dissent. They argued that Capper-Volstead was only designed to eliminate middlemen, enabling the farmers themselves to perform that function. In examining legislative history, Justice White recalled the remarks of Senator Norris, who stated that the purpose of Capper-Volstead "was to permit farmers 'to combine with [their] neighbors and cooperate and act as a corporation, following [their] product from

the farm as near to the consumer as [they] can, doing away in the meantime with unnecessary middlemen.' That is all the bill intends to do." ..... U.S. at .....

That analysis is perfectly consistent with the narrow construction urged here by petitioner. Indeed, when the Clayton Act was under consideration, an amendment was offered to expand the protection of the antitrust laws to permit farmers to fix prices. The exemption was to apply "to *any arrangements, agreements or combinations* among persons engaged in horticulture or agriculture *made with a view of enhancing the price* of [their own] agriculture or horticulture products." 51 Cong. Rec. 9540 (1914) (emphasis added). The amendment was defeated in favor of the limited organizational immunity offered by Section 6 of the Clayton Act.

With Central engaged in no significant activity but price fixing, and composed of huge, vertically integrated multinational corporations, this case brings to the court the vision which Justice Brennan foresaw in his concurring opinion in *National Broiler Marketing:*

> "The dissent's construction, it seems to me, would permit the behemoths of agribusiness to form an exempt association to engage in price-fixing, and territorial and market division, so long as these concerns are engaged in the production of agriculture. It is hard to believe that in enacting a provision to authorize horizontal combinations for purposes of collective processing, handling and marketing so as to eliminate middlemen, Congress authorized firms which integrated further down-stream beyond the level at which cooperatives could be utilized for these purposes to combine horizontally as a cartel with license to carve up the national agricultural market. Such a construction would turn on its head Congress' manifest purpose to protect the small, individual, economic units engaged in farming from exploitation and extinction . . . ." ..... U.S. at .....

During oral argument in the District Court, Judge Orrick correctly perceived this case be an important one; one which should be decided by this Court: "This case is an important case—not that every case isn't—but this one is exploring new ground, and I would assume from . . . counsel on both sides that it would go the Supreme Court, because it cuts right into a brand new field in anti-trust law." (Trans. pp. 15-16).

Moreover, because this record reveals that Inter-Harvest, one of the named defendants and a member of the Cooperative is a wholly owned subsidiary of United Brands, which the Court may judicially notice as a large, vertically integrated multinational corporation, this case also presents the question whether United Brands can be considered to be a person "such as" a farmer within the meaning of Capper-Volstead. That question was specifically unanswered by this Court in *National Broiler Marketing, supra,* ..... U.S. at ....., n. 21, where the Court found it unnecessary to consider whether the fully integrated producer can qualify as a person sought to be protected under the terms of the Act.

The question presented in this petition is an important one.

For this Court to await a conflict in the Circuits may mean an important shift in national economic policy will have occured prior to the authoritative resolution of the issue. The suggestion that price fixing, standing alone, may be sheltered, by implication, from the operation of the Sherman Act is startling to any student of the antitrust laws. When that proposition is amplified by the statement that the price fixing which has been approved has been

done by major, vertically integrated multinational corporations, a statement on the subject from this Court is required.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully submitted.

J. MICHAEL HENNIGAN
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORTHERN CALIFORNIA SUPERMARKETS, INC.,
Plaintiff-Appellant,
vs.
CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et al.,
Defendants-Appellees.

No. 76-1456
OPINION

Appeal from the United States District Court
for the Northern District of California

Before: SMITH,* DUNIWAY AND WALLACE, *Circuit Judges*

Per Curiam:

The judgment is affirmed for the reasons stated by the trial judge, Judge Orrick, in his opinion. *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, et al.*, N.D. Cal., 1976, 413 F. Supp. 984. See also, the opinion of the Federal Trade Commission in the matter of *Central California Lettuce Producers Cooperative, et al.*, Docket No. 8970, July 25, 1977, C.C.H. Trade Regulation Reports, ¶ 21,337.

Affirmed.

Filed AUGUST 11, 1978.

EMIL E. MELFI, JR.
Clerk.

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* The Honorable J. Joseph Smith, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORTHERN CALIFORNIA SUPERMARKETS, INC.,

Plaintiff,

vs.

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et al.,

Defendants.

No. C-74-2002 WHO
OPINION
(filed January 30, 1976)

In this antitrust action, plaintiff, Northern California Supermarkets, Inc. (Northern), charges that defendants, Central California Lettuce Producers Cooperative (Central) and nine of its members, have combined and conspired to fix the price of lettuce shipped in interstate commerce from the Salinas-Watsonville-King City area of the Salinas Valley in California in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) (Section 1). The Court must determine if the activities of defendants, alleged to be in violation of Section 1, are shielded from antitrust attack by Section 6 of the Clayton Act (15 U.S.C. §§ 291-292) (Capper-Volstead), and/or Section 5 of the Cooperative Marketing Act of 1926 (7 U.S.C. § 455) (Section 5). For the reasons hereinafter stated, I hold that Section 6 and Capper-Volstead, and each of them, exempt the activities of defendants challenged in this complaint from the application of Section 1.[1]

[1] Accordingly, I do not reach the question of the effect, if any, of Section 5 on Central's activities.

I.

The question at issue is before the Court on cross-motions for summary judgment supported by statements of facts, voluminous briefs, affidavits, one deposition, answers to interrogatories, and requests for admission.[2] The facts hereinafter summarized are essentially undisputed.

Plaintiff, Northern, is a California corporation engaged in the retail sale of groceries, including produce, through twenty supermarkets (Purity and Friendly Supermarkets) scattered throughout Northern California.

Defendant Central is a nonprofit cooperative association, without capital stock, incorporated under the provisions of Chapter 1, Division 20, of the Agricultural Code of the State of California, for the purpose of providing mutual help in connection with producing and marketing, including selling, of any farm product of its members. Central's purpose, among other things, is to improve conditions in the produce industry for the mutual benefit of its members as producers by promoting, fostering, and encouraging the intelligent and orderly marketing of agricultural products through cooperation; eliminating speculation and waste; making the distribution of agricultural products between producers and consumers as direct as can be officially done; stabilizing the marketing of agricultural products; encouraging efficiency and economy in marketing; preventing the demoralizing of markets resulting from dumping and predatory practices; mitigating the recognized evils of a

[2] Counsel for all parties agreed in open Court that there are no genuine issues of the material facts. The Court is, of course, aware of the *caveat* expressed time after time by the Supreme Court against the use of summary judgments in complex antitrust cases. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969). But, this case is one in which the Court agrees there are no undisputed facts and that the case is ripe for disposition by summary judgment. See, *Hycon Manufacturing Co., v. H. Koch & Sons,* 219 F.2d 353 (9th Cir. 1955), *cert. denied* 349 U.S. 963 (1955).

marketing system under which prices are set for the entire industry by the weakest producers; and fostering the ability of the members of the cooperative to obtain prices for their products in competitive markets which are fair prices but not prices inflated beyond the reasonable value of such products by reason of artificially-created scarcity of such products or other predatory practices which would injure the public interest.

Each of the other nine defendant corporations[3] (member-defendants) is a grower-shipper of fresh produce, including lettuce, in the growing areas of California and Arizona and is a member of Central. Each member-defendant grows lettuce in the Salinas-Watsonville-King City area, the agricultural production area of concern in this case.

The member-defendants formed Central in 1972 for the purpose of ameliorating conditions of price uncertainty, demand inelasticity, and distress selling which historically characterized lettuce production. Lettuce is a perishable food, which means that once it ripens it must be harvested and shipped within four or five days. Harvesting decisions are made on a day-to-day basis and depend on such factors as volume shipped, the prices received on the preceding day, information concerning price in major terminal markets, local weather conditions, and the condition of the crop. Lettuce is cut, packed, and inspected in the field. It is normally packed twenty-four heads to a cardboard carton and then trucked to a cooling station. Buyers may inspect the lettuce in the field or at the cooling place, and may there compare quality as between different grower-shippers or between the lettuce produced in different fields but handled by the same grower. While lettuce is not advertised to consumers on a brand basis, individual label names are used by growers, and certain labels have

[3] Admiral Packing Company, Green Valley Produce Co-op, Growers Exchange, Inc., Let-Us-Pak, Pacific Lettuce, Royal Packing Company, Salinas Marketing Cooperative, The Garin Company, and United Brands Company.

achieved some measure of trade recognition for quality. The cartons of lettuce are shipped from the cooling places by rail or truck to destinations throughout the United States. Most lettuce is sold f.o.b. at the shipping point.

Common marketing practices included distress consignments, "no-bills" and "rollers". Distress consignments occurred when shipments of lettuce could not be sold at the shipping points and were, therefore, consigned to a wholesaler who would undertake to sell the shipment at the terminal market. In the absence of a sale or consignment, a grower-shipper sometimes "rolled" a shipment of lettuce toward Eastern markets and endeavored to sell it while the shipment was enroute. Otherwise, he might "no-bill" the shipment, that is, provide no bill of lading for that day, but hold the shipment for another day for possible sale or consignment.

In May, 1973, Central entered into an identical "Cooperative Marketing Agreement" with each of its twenty-two members, including the nine member-defendants. Under the terms of the Agreement, the members exchange information regarding the actual and expected status of all crops and agree (a) to inspection of the condition, quality, and quantity of their crops, (b) to make no discounts or concessions in lieu of brokerage, (c) to sell lettuce within the limits of ceiling prices and floor prices established by Central and not to ship lettuce which has not been sold or consigned, and (d) to report delinquent accounts and chronic complainers to Central. Members have also agreed that lettuce sold by the members shall be in master containers which identify the lettuce as being sold by a member of Central. During 1973-1974, the years which are concerned in this action, each member-defendant had a seat on the Board of Directors, as well as on the Executive Committee, of Central. The Executive Committee met at least weekly and determined the pricing policy to which each member would adhere in the sale of lettuce for a specified period. The Committee usually determined a ceiling price and, in at least one case, a minimum

and a maximum price to be charged by its members. The Committee members exchanged market information in the process of determining pricing policies.

Central itself has never shipped, handled, harvested, or grown any lettuce. Central does not negotiate directly with buyers of lettuce, and during the 1973-1974 season, no lettuce was sold by Central acting in its own name or through agents employed by Central to act in its own name. Central has never employed any sales personnel and, during the 1973 season, it had no payroll whatsoever. Central's income comes from membership fees and assessments.

Each member of Central conducts its own individual sales program and each member has retained the trademark under which it did business prior to the formation of Central. Each member negotiates and sells to buyers of lettuce directly and payment for such lettuce is billed and collected for each member's individual account.

Defendants have publicized their organization and the terms of their collective bargaining agreement through a series of advertisements in *The Packer,* a trade newspaper. During periods of low price and large supply defendants, through Central, have sponsored special programs to increase the sale of lettuce.

During 1973, some 31,262,000 cartons of lettuce were shipped from the Salinas-Watsonville-King City growing area, of which shipments by the member-defendants totaled approximately 20,200,000. During 1973-1975, Northern purchased over 40,000 cartons of lettuce through the medium of a nonprofit purchasing cooperative, most of which was produced and marketed by the member-defendants.

Plaintiff and defendants agree that the primary activity of Central is to set prices or price ranges to which members are required to adhere in the sale of their lettuce. The record indicates that Central also engages in other activities related to

the marketing of lettuce. For example, Central gathers and disseminates information concerning lettuce planting, harvesting, and shipment. Information is also exchanged by the members concerning delinquent accounts and "chronic customer complainers". In addition, Central coordinates policies with respect to marketing practices which proved harmful to lettuce growers and has undertaken promotional campaigns aimed at bolstering lettuce sales. However, Northern maintains that these other activities are separate and unrelated to the price-fixing function of the cooperative.

The gravamen of Northern's complaint against Central and the member-defendants is that their activities described above in the marketing and selling of lettuce constitute an unlawful combination and conspiracy to restrain trade and commerce in violation of Section 1 by eliminating competition in the sale and marketing of fresh lettuce and by raising, fixing, controlling, and establishing the prices and price ranges at which each member-defendant offers to sell, or sells, lettuce.[4] By way of affirmative defense, Central and its members assert that their activities are insulated from antitrust attack by Section 6, Section 1 of Capper-Volstead and Section 5. Northern responds that these statutes only permit price-fixing by an

[4] Northern further charges that this conspiracy has been carried out by Central and the member-defendants through meetings at which they have discussed or agreed upon the prices or price ranges at which each member-defendant would sell lettuce to its customers and by agreeing in writing to sell lettuce to all customers only at prices within the limits of the ceiling and floor prices established on a weekly or daily basis by Central. Northern claims that the effect of the alleged combination and conspiracy has been to fix and maintain prices for Salinas Valley lettuce at artificial and noncompetitive levels and to deny the purchasers of such lettuce the opportunity to purchase lettuce at competitively determined prices. Northern further charges that competition among the producers and marketers of Salinas Valley lettuce has been unlawfully and unreasonably restricted and that it and all other persons who purchased the Salinas Valley lettuce have been forced to pay unreasonably high prices for such lettuce.

agricultural cooperative where the price-fixing is ancillary to and a necessary incident of an otherwise legitimate collective activity. Northern claims that since Central performs no collective function to which price-fixing can be said to be a reasonable and necessary incident, its price-fixing is not protected.

II.

To determine whether the activities of Central and the member-defendants are shielded from antitrust attacks by Section 6 and Capper-Volstead, we turn to an analysis of the legislative history of the Acts and a review of the cases interpreting the Acts.

A. Section 6

The last time antitrust was an issue in a presidential campaign was in 1912, and it was in response to President Wilson's promises that the Congress in 1914 passed the Clayton Act. But, the Congress, concerned about the minimal bargaining power of the individual farmers in the markets in which he buys and sells, and in order to encourage him to form agricultural organizations for mutual help, exempted such organizations from the application of the antitrust laws by enacting Section 6. The exemption provides that:

> "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall

> such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17.[5]

Section 6 expressed the Congressional policy of treating farmers differently from industrialists and middlemen. Congress perceived farmers as being at the mercy of sharp dealers in the sale of their produce and, therefore, made it possible for them to form cooperatives to help themselves. See *Tigner v. Texas,* 310 U.S. 141, 145-146 (1940); *Frost v. Corporation Commisson,* 278 U.S. 515 (1928) (dissenting opinion, Holmes, J.).

The general effect of Section 6 was to assure that the existence of agricultural organizations *per se* would not be deemed to be an illegal conspiracy or restraint of trade, and that members of such organizations would not be judicially

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[5] The inclusion of the agricultural exemption in Section 6 was prompted by the fact that agricultural cooperatives had been subjected to prosecutions in various state courts for monopolistic and conspiratorial activities. Comment, *Agricultural Cooperatives—The Clayton Act and the Capper-Volstead Act Immunize the Concerted Price Bargaining of Two Agricultural Cooperatives from Antitrust Liability,* 53 Tex. L. Rev. 840 (1975) (hereinafter cited as Comment, *Agricultural Cooperatives); Antitrust Exemptions—Agricultural Cooperatives,* 31 A.B.A. Antitrust L. J. (1967).

> The House and Senate Committee Reports on Section 6 (H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914); S. Rep. No. 698, 63d Cong., 2d Sess. (1914)) manifested a Congressional desire to erase all doubt about the propriety of the existence of agricultural associations meeting the statutory requirements, and also to prevent a judicial construction of the antitrust laws which would require dissolution of such cooperatives or interfere with the carrying out of their legitimate and lawful objects. Comment, *Agricultural Cooperatives, supra,* at 841 n.10.

> Section 6 has thus been regarded as granting to farmers the right to organize in order to take collective action for their mutual benefit. Saunders, *The Status of Agricultural Cooperatives Under the Anti-trust Laws,* 20 Fed. B. J. 35 (1960).

harassed under the antitrust laws for combining to carry out the legitimate objects of the organization. Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will be Reaffirmed,* 22 Ad. L. Rev. 455, 458 (1969-1970).

The structural requirements for Section 6 exemptions are not stringent. An agricultural organization without capital stock, instituted for mutual self-help and not conducted for profit, qualifies for the exemption. That is precisely what Central is—an agricultural organization without capital stock formed for the purpose of mutual help. It is not conducted for profit.

B. Capper-Volstead

In 1922, in order to extend the Section 6 immunization from antitrust attack to farmer organizations with capital stock, the Congress enacted the Capper-Volstead Act, Section 1 of which reads as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members." 7 U.S.C. § 291.

Capper-Volstead was enacted to clarify and extend the Section 6 exemption. *Case-Swayne Co. v. Sunkist Growers,* 389 U.S. 384, 391 (1967). The Act explicitly enumerated certain legitimate activities of qualifying cooperatives. One significant purpose of the statute was to make it clear that farmers could operate collectively for the purpose of marketing as well as preparing for market. 20 A.L.R. Fed. 924, 927 (1974). A principal objective was to allow farmers to take advantage of the corporate form of organization used by business concerns. 61 Cong. Rec. 1033 (remarks of Congressman Volstead). As expressed by its sponsors, the thrust of the bill was to give farmers a fair opportunity to meet business conditions of the times by forming into collective aggregates without fear of prosecution under the antitrust laws in order to equalize the situation between individual farmers and corporate middlemen. H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921).

C. Scope of the Exemptions

The best summary of the legislative history and the nature of the agricultural exemption under Section 6 and Capper-Volstead is contained in Justice Black's opinion in *Maryland and Virginia Milk Producers Ass'n v. United States,* 362 U.S. 458, 465-466 (1960):

"The language [of Section 6] shows no more than a purpose to allow farmers to act together in cooperative associations without the associations as such being 'held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws,' as they otherwise might have been. This interpretation is supported by the House and Senate Committee Reports on the bill. Thus, the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof' (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will. [Citations omitted.]

The Capper-Volstead Act of 1922 extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives which had not previously been covered by that section. Section 1 of the Capper-Volstead Act also provided that among 'the legitimate objects' of farmer organizations were 'collectively processing, preparing for market, handling, and marketing' products through common marketing agencies and the making of 'necessary contracts and agreements to effect such purposes.' We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:

'Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it.'

This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws."

Despite the preferred treatment given to agricultural producers, it is clear that neither Section 6 nor Capper-Volstead was intended to create an absolute shield from antitrust liability for agricultural cooperatives. Farmers and their organizations have been held to lose protection from antitrust attack when the cooperative or its members combine with nonproducer "outsiders" to unreasonably restrain trade. *United States v. Borden Co.*, 308 U.S. 188 (1939). Nor are farmers immune when the cooperative or its members engage in predatory, competitive-stifling practices directed at restraining trade or monopolizing the market by unlawful means. *Maryland and Virginia Milk Producers Ass'n v. United States, supra;* see generally, 20 A.L.R. Fed. 924 (1974) *et seq.*

Neither situation is here present. There is no allegation that Central or its members have combined or attempted to combine with nonproducers, nor is there any allegation that defendants have engaged in predatory practices or have attempted to monopolize, or monopolized, the market by unlawful means.[6]

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[6] It should be noted that the cases where courts have found predatory practices have involved serious coercive conduct aimed at bringing nonmember producers into the cooperative or achieving monopoly through threats, boycotts, and interference with others. See, e.g., *Maryland and Virginia Milk Producers Ass'n v. United States,* 362 U.S. 458 (1960); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers,* 241 F.Supp. 476 (E.D. Md. 1965), *aff'd* 368 F.2d 879 (8th Cir. 1966); *Washington Crab Ass'n,* 66 F.T.C. 45 (1964); *North Texas Producers Ass'n v. Metzger Dairies, Inc.,* 348 F.2d 189 (5th Cir. 1965), *cert. denied* 382 U.S. 977 (1966). See also *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.,* 497 F.2d 203, 216-217 n.11 (9th Cir. 1974), *cert. denied* 419 U.S. 999 (1974).

III.

The principal dispute between the parties here concerns the scope of the protection afforded by Capper-Volstead, and the effect of Capper-Volstead on the Section 6 exemption.

Northern contends that Section 6 and Capper-Volstead must be read together, and thus Central's claim to immunity must rise or fall on whether or not it is engaged in "collective marketing" within the meaning of Capper-Volstead.

Northern asserts that the antitrust exemption afforded by Section 6 and Capper-Volstead is limited in scope and should be construed narrowly. According to Northern, the purpose of the exemptions was to give farmers greater bargaining power by allowing them to form associations to perform specific functions, i.e., collective marketing, processing, and handling. The thrust of the exemption, therefore, was to put farmers on an equal basis with corporate middlemen and buyers by allowing the farmers to do business in a corporate-type form. Thus, Northern concludes the purpose of the limited exemption for agricultural cooperatives is to permit farmers to associate for mutual benefit by acting collectively through the single medium of a cooperative. The statutory exemptions contemplate that a cooperative will represent its members and that *it will be the entity* through which the members act.

Northern then argues that Central does not engage in collective marketing within the meaning of Capper-Volstead, and thus the action of Central and its members constitutes illegal price-fixing, a *per se* violation of Section 1, because each member of Central acts independently for its own account in every material aspect except for the determination of the price range at which it sells. Since Central does not grow, harvest, ship, sell or negotiate for sale in its own name, Northern contends that it is not engaged in "collective marketing". Essentially, Northern argues that an agricultural cooperative must engage in bargaining, selling, processing or handling

before it can also fix prices. Northern further claims that the price-fixing in this case is especially reprehensible because the growers are not small struggling farmers but "a group of big corporate businesses attempting to find shelter" from the antitrust laws.

Central, on the other hand, contends that Section 6 and Capper-Volstead, although overlapping, are separate and independent sources of protection for its activities.

I agree. I find that Central's activities, including price-fixing, fall within the scope of protection from the antitrust laws afforded by Section 6 and Capper-Volstead.

I am persuaded that since Justice Black, in *Maryland and Virginia Milk Producers Ass'n v. United States, supra,* stated that the activities enumerated in Section 1 of Capper-Volstead were "among the 'legitmate objects' of farmer organizations" this necessarily implies that (a) Section 6 and Capper-Volstead, although overlapping, are not synonymous, and (b) it is not necessary for a farmer association to engage in all of the enumerated activities to qualify for the exemption.

I am further convinced that Central's activities are consistent with the purpose of the statutes "to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their products". *Maryland and Virginia Milk Producers Ass'n v. United States, supra,* 362 U.S. at 466.

The recent Ninth Circuit opinion in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.,* 497 F.2d 203 (9th Cir. 1974), *cert. denied* 419 U.S. 999 (1974), is controlling here. Treasure Valley was a cooperative of potato growers, the principal function of which was to bargain collectively for its members with respect to the price and terms of preseason potato contracts. The association did not process, prepare for market, handle, buy or sell any potatoes; all of the actual selling was done by the individual members. Another similar coopera-

tive was also involved in the case, and the officers and members of the two cooperatives met and exchanged information regarding negotiations with buyers so that neither cooperative would undersell the other.

The two cooperatives had filed an antitrust action against the potato processors; the processors had counter-claimed against the associations, claiming that neither was exempt under Capper-Volstead because they engaged in none of the functions enumerated in the statute.

The Court stated:

> "True, the associations did not collectively *process, prepare for market, handle* or actually sell potatoes. But Section 1 of the Capper-Volstead Act further authorizes 'Persons engaged in the production of agricultural products as farmers . . . [to] act together in associations . . . in collectively . . . *marketing* in interstate and foreign commerce, such products of persons so engaged . . . .' (Emphasis added)" 497 F.2d at 215.

The Court then concluded:

> "The activities of the two associations came within the word *marketing.*" Id.

* * * * *

and continued;

> "We think the term *marketing* is far broader than the word *sell.* A common definition of 'marketing' is this: 'The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk bearing, and *supplying market information.*' Webster's New Collegiate Dictionary, 1953 Edition. [Emphasis added]. The associations here were engaged in bargaining for the sales to be made by their

> individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing 'marketing' functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act." Id.

Central's activities fall within the term "marketing" as broadly construed in *Treasure Valley.* Section 6 authorizes members of farmers cooperatives to carry out the legitimate objects of the association. Capper-Volstead authorizes those objects to be obtained or furthered by members by making contracts or agreements. Central's members, in pursuit of the marketing objectives of the cooperative, were authorized to sell their lettuce within approved price ranges through contracts or agreements. The aggregate of activities of Central constitute "collective marketing" within the meaning of the phrase as defined in *Treasure Valley.* Here, as in *Treasure Valley,* Central was "supplying market information and performing other acts involved in the transferring of title" of the produce. 497 F.2d at 215. But, even in *Treasure Valley, the principal* function of the cooperative was to set prices.[7]

Northern tries to distinguish *Treasure Valley,* saying that the cooperative there engaged in collective bargaining whereas Central only sets prices, but each member does his own bargaining. This is a distinction without a difference.

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[7] In the course of the litigation in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.,* 497 F.2d 203 (9th Cir. 1974), *cert. denied* 419 U.S. 999 (1974), the court also recognized a distinction between Section 6 and Capper-Volstead. The district court had found that the Treasure Valley cooperative was protected by Section 6, but not by Capper-Volstead. Although the Ninth Circuit found that Capper-Volstead applied, it left untouched the district court's ruling as to the Section 6 exemption.

Moreover, I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption.

It is true that the sponsors of Capper-Volstead were laboring under the assumption that the cooperative or association would be the collective marketing agent for the farmers in most circumstances. However, there is nothing in the legislative history that suggests a Congressional intention to *force* farmers into a corporate form or that collective marketing with the cooperative as the exclusive agent was considered the *only* form under which farmers' groups could organize.[8]

Indeed, Congressman Volstead stated:

> "The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provisions of this bill." H.R. Rep. No. 24, 67th Cong., 1st Sess. (1921).

[8] Congress was aware of the existence of farmers' associations similar to Central at the time Capper-Volstead was considered. Members of such associations met and agreed among themselves upon a price at which they individually should sell their products. This is clear from the testimony of G. Carroll Todd, former head of the Antitrust Division of the Department of Justice, in hearing on the bill, as well as from statements of Dallas Berry of the Maryland and Virginia Milk Producers Association, Inc. at the same hearings. Hearings on S. 4344 before the Senate Committee on the Judiciary, 66th Cong., 2d Sess. (1920) at 37-43 or 63-64.

Furthermore, it appears that Congress intended to authorize price-fixing by an agricultural cooperative unless the organization engaged in predatory practices or monopolization.[9]

As Senator Reavis pointed out:

> "This legislation is primarily inspired by the desire to put the farmer in a condition, through cooperation and organization, where in some measure he may overcome the difficulties that inhere in his business, that make cooperation and organization almost impossible, to relieve him in some measure from his natural handicaps and put him on an equal footing with all the other businessmen of America and *permit him in some measure to fix the price of the thing that he raises.*" 61 Cong. Rec. 1038 (1921) (Emphasis added).

Thus, in absence of predatory practices or a combination with outsiders, an alleged conspiracy or combination among an agricultural cooperative and its members in regard to pricing policies is immune from the proscriptions of Section 1. See *United Egg Producers v. Bauer International Corp.*, 312 F.Supp. 319 (S.D.N.Y. 1970); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., supra,* 497 F.2d at 212-213.

[9] Protection against excessive prices or predatory practices was provided by Section 2 of Capper-Volstead, which authorizes the Secretary of Agriculture to issue a cease-and-desist order upon a finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been "unduly enhanced". Section 2 further provides that such an order may be enforced by the Attorney General in appropriate proceedings in the district court if it is disregarded. 7 U.S.C. §292.

The enactment of Section 2 reflected a congressional desire to limit the power of cooperatives to restrain trade or achieve monopoly by engaging in unfair methods of competition. *Maryland and Virginia Milk Producers Ass'n v. United States,* 362 U.S. 458, 466-467; *April v. National Cranberry Association,* 168 F.Supp. 919, 922-923 (D. Mass. 1958). However, as noted, there is no claim here that Central has engaged in any predatory practices.

Protection for price-fixing follows from the effect of Section 6 and Capper-Volstead in equating an agricultural cooperative and its members with an individual business entity since a single business enterprise may set for itself even wholly unreasonable prices without violating Section 1. *April v. National Cranberry Association,* 168 F.Supp. 919, 921-922 (D. Mass. 1958).[10]

Thus, Capper-Volstead, like Section 6, shields Central's activities from the application of the antitrust laws. Central, as we have seen, is an association without capital stock formed by persons engaged in the production of agricultural products as farmers who are acting in Central "in collectively . . . marketing in interstate and foreign commerce such products of persons so engaged . . .".[11]

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[10] Central also relies on the FTC case of *Washington Crab Ass'n.,* 66 F.T.C. 45 (1964), where the Commission considered a challenge to the activities of a fishermen's cooperative. The FTC recognized that the members of the association had fixed prices. However, the FTC noted that this they were expressly permitted to do under Section 1 of the Fishermen's Collective Marketing Act (15 U.S.C. 21) which the FTC considered as virtually identical to Section 1 of Capper-Volstead. It does for the fishermen precisely what Capper-Volstead does for the farmers. The FTC concluded that price fixing was an approved objective if not pursued by predatory techniques. 66 F.T.C. at 105-106.

[11] Northern has submitted to the Court a copy of the initial decision rendered by an administrative law judge in a proceeding before the Federal Trade Commission, *Central California Lettuce Producers Cooperative,* No. 8970 (March 13, 1975). Faced with the same issues presented for consideration in this case, the administrative law judge decided that Central was *not* engaged in collective marketing as defined in Capper-Volstead and, therefore, was not exempt from the antitrust laws. He held the purpose of Capper-Volstead was to allow farmers to join together to bargain "as one", thus permitting a pooling of resources of small, disorganized growers into a single, democratically functioning corporate entity and that to be exempt, a cooperative must acquire and bargain to sell the entire production of its members, or at least bargain for the members in the open market.

Accordingly, I hold that Central's activities are protected from antitrust attack by both Capper-Volstead and Section 6, since it is doing no more than carrying out the legitimate objects of an agricultural organization.[12]

Defendants also claim protection under Section 5 of the Cooperative Marketing Act of 1926 (7 U.S.C. § 455)[13] which

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He also expressed the opinion that the statute was intended to protect small farmers, and it should not be allowed to shield the activities of giant agribusiness from the antitrust laws.

However, neither Section 6 nor Capper-Volstead contain restrictions on the size of growers who are exempted under the Acts. Moreover, the administrative law judge did not adequately distinguish *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.,* 497 F.2d 203 (9th Cir. 1974), *cert. denied* 419 U.S. 999 (1974). He argued that Treasure Valley was a bargaining cooperative; thus the decision "left open" the question whether mere agreement about prices without any other form of cooperative activity falls within "collective marketing". *Treasure Valley* should not be read so narrowly. Indeed, the decision cites with approval the remarks of Mr. Seth Hufstedler of the Administrative Law Section of the American Bar Association, who stated that a Capper-Volstead cooperative "may fix prices". *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., supra,* 497 F.2d at 216 n.11.

[12] Northern also relies on *United States v. Elm Springs Farms,* 38 F.Supp. 508 (D. Mass. 1941), modified on other grounds, 127 F.2d 920 (1st Cir. 1942), where the court states that the mere establishment of a cooperative farm does not insulate the activities of its members from antitrust attack. But that case is completely distinguishable. It involved an attempt by a milk handler to evade a federal marketing order by a series of corporate reorganizations through which it tried to magically transform itself into an exempt producer cooperative *after* it had originally been ordered to comply with the marketing order. The Court just was not impressed with the defendants attempted magical transformation.

[13] Section 5 of the Cooperative Marketing Act of 1926 reads:

"Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit

authorizes the exchange of information between persons engaged in collective marketing of agricultural products through an association. It is unnecessary to rule on this claim for exemption in light of the above holdings.

I grant Central's motion for summary judgment and deny Northern's motion for summary judgment. Central shall submit a form of judgment approved by Northern by February 16, 1976.

Dated: January 30, 1976.

WILLIAM H. ORRICK, JR.

William H. Orrick, Jr.
United States District Judge

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growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them." 7 U.S.C. §455.

APPENDIX C

SECTION ONE, CAPPER-VOLSTEAD ACT

(Act of February 18, 1922, Chap. 57, 42 Stat. 388; 7 U.S. Code, Secs. 291.)

AN ACT to authorize association of producers of agricultural products.

That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. [February 18, 1922, Chap. 57, Sec. 1, 42 Stat. 388; 7 U.S. Code, Sec. 291.]

APPENDIX D

SECTION 5, COOPERATIVE MARKETING ACT OF 1926

Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them. [July 2, 1926, Chap. 725, Sec. 5, 44 Stat. 803; 7 U.S. Code, Sec. 455.]

APPENDIX E

SECTION 6, CLAYTON ACT:

That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [October 15, 1914, Chap. 323, Sec. 6, 38 Stat. 731; 15 U.S. Code, Sec. 17.]

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-764

NORTHERN CALIFORNIA SUPERMARKETS, INC.,
Petitioner,

vs.

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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NORTHERN CALIFORNIA SUPERMARKETS, INC.,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Petitioner, Northern California Supermarkets, Inc. ("Northern"), and respondents cross-moved for summary judgment on stipulated and uncontroverted facts. The United States District Court for the Northern District of California granted respondents' motion for summary judgment and denied petitioner's motion in a detailed and carefully reasoned twenty-page opinion. The parties having waived oral argument, the Court of Appeals for the Ninth Circuit affirmed the District Court's judgment per curiam, adopting the District Court's opinion. The Court of Appeals further referred to a ruling of the Federal Trade Commis-

sion which dismissed a similar complaint filed against Central California Lettuce Producers Cooperative and certain of its members in a separate yet related proceeding. The opinions of the Ninth Circuit and the District Court are reprinted as Appendix A and Appendix B, respectively, to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the setting of prices by an agricultural cooperative is a marketing function protected under the antitrust laws?

2. Whether the facts in the record show marketing activity protected under antitrust laws?

STATUTES INVOLVED

The pertinent provisions of the statutes involved (Section 6 of the Clayton Act, 15 U.S.C. § 17, Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455) are set forth in Appendices C, D and E to the Petition, 23a-25a.

STATEMENT OF THE CASE

Petitioner Northern California Supermarkets, Inc., ("Northern") brought this action against the Central California Lettuce Producers Cooperative ("Central"), an organization composed of twenty-two Salinas Valley lettuce growers,[1] and against nine of Central's members, charging

[1]It is admitted and uncontroverted that all members of Central are actual growers of lettuce. Pet. 3; 413 F.Supp. at 986.

them with violating Section 1 of the Sherman Act. On cross motions for summary judgment, the District Court found that there was no dispute as to any material facts. 413 F. Supp. at 985 n.2. In an opinion by the Honorable William H. Orrick, Jr., the District Court summarized the facts, which Northern in no way disputed before the Court of Appeals, as follows:

> "Defendant Central is a nonprofit cooperative association, without capital stock, incorporated under the provisions of Chapter 1, Division 20, of the Agricultural Code of the State of California, for the purpose of providing mutual help in connection with producing and marketing, including selling, of any farm product of its members. *Central's purpose, among other things, is to improve conditions in the produce industry for the mutual benefit of its members as producers* by promoting, fostering, and encouraging the intelligent and orderly marketing of agricultural products through cooperation; eliminating speculation and waste; making the distribution of agricultural products between producers and consumers as direct as can be officially done; stabilizing the marketing of agricultural products; encouraging efficiency and economy in marketing; preventing the demoralizing of markets resulting from dumping and predatory practices; mitigating the recognized evils of a marketing system under which prices are set for the entire industry by the weakest producers; and fostering the ability of the members of the cooperative to obtain prices for their products in competitive markets which are fair prices but not prices inflated beyond the reasonable value of such products by reason of artificially-created scarcity of such products or other predatory practices which would injure the public interest."

413 F.Supp. at 985-986 (emphasis added).

"In May, 1973, Central entered into an identical 'Cooperative Marketing Agreement' with each of its twenty-two members, including the nine-member defendants. Under the terms of the Agreement, *the members exchange information* regarding the actual and expected status of all crops *and agree* (a) *to inspection of the condition, quality, and quantity of their crops*, (b) *to make no discounts or concessions in lieu of brokerage*, (c) *to sell lettuce within the limits of ceiling prices and floor prices established by Central and not to ship lettuce which has not been sold or consigned*, and (d) *to report delinquent accounts and chronic complainers to Central. Members have also agreed that lettuce sold by the members shall be in master containers, which identify the lettuce as being sold by a member of Central.* During 1973-1974, the years which are concerned in this action, each member-defendant had a seat on the Board of Directors, as well as on the Executive Committee, of Central. The Executive Committee met at least weekly and determined the pricing policy to which each member would adhere in the sale of lettuce for a specified period. The Committee usually determined a ceiling price and, in at least one case, a minimum and a maximum price to be charged by its members. *The Committee members exchanged market information in the process of determining pricing policies.*"

413 F.Supp. at 986-987 (emphasis added).

"Plaintiff and defendants agree that the primary activity of Central is to set prices or price ranges to which members are required to adhere in the sale of their lettuce. *The record indicates that Central also engages in other activities related to the marketing of lettuce. For example, Central gathers and disseminates information concerning lettuce planting, harvesting, and shipment. Information is also exchanged by the members concerning delinquent accounts and 'chronic customer complainers'. In addition, Central coordinates policies with respect to marketing practices which proved harmful to lettuce growers and has undertaken promotional campaigns aimed at bolstering lettuce sales.*"

413 F.Supp. at 987 (emphasis added).

"There is no allegation that Central or its members have combined or attempted to combine with nonproducers, nor is there any allegation that defendants have engaged in predatory practices or have attempted to monopolize, or monopolized, the market by unlawful means."

413 F.Supp. at 990.

On the basis of these facts, the District Court held that Central and its members were entitled to the protections afforded by Section 6 of the Clayton Act and by the Capper-Volstead Act.[2] Accordingly, respondents' cross motion for judgment was granted and Northern's motion denied.

Northern appealed from that judgment to the Court of Appeals for the Ninth Circuit. In a per curiam opinion, the Ninth Circuit affirmed, adopting the District Court's extensive opinion. (The Ninth Circuit also cited to the opinion of the Federal Trade Commission in *Central California Lettuce Producers Cooperative, et al.*, Docket No. 8970, July 25, 1977, CCH Trade Reg. Rpts. ¶ 21,337. The complaint filed by the Federal Trade Commission and the initial

[2]Respondents have also claimed the protection of Section 5 of the Cooperative Marketing Act of 1926. The courts below did not rule on this claim since they found the protections afforded by Section 6 and Capper-Volstead applicable.

decision by the administrative law judge therein was clearly the genesis of the Northern's action. The Commission, however, in a lengthy opinion, reversed the administrative law judge's initial decision and dismissed the complaint.) This Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

Simply stated, Northern's Petition should be denied since there is nothing significant about this case which warrants this Court's attention. The decision below is not in conflict with the decision of any other court of appeals, is not in conflict with applicable state law, and is not in conflict with the applicable decisions of this Court. The courts below did not in any way depart from the accepted and usual course of judicial proceedings. The questions sought to be raised before this Court were fully and correctly analyzed below, and were decided in accordance with all applicable authorities. And, Northern's Petition would have this Court take upon itself the role of redeciding what is essentially a factual question.

I. THE DECISION BELOW IS WELL-REASONED AND FULLY SUPPORTED BY THE UNCONTROVERTED FACTS.

A. Northern's Petition Asks This Court to Ignore Relevant and Undisputed Facts.

The sole legal argument made by Northern in its Petition is that "all Central does is provide a forum for its individual members to fix lettuce prices" (Pet. 3), and that "price fixing [must] be ancillary to and an incident of the collective marketing of agricultural products" for it to be protected under the antitrust laws. (Pet. 7) In short, Northern asks this Court to review the decision below on the premise that "no significant, or material activity was performed by the Cooperative other than price fixing." (Pet. 5)

Northern's factual premise for this argument, however, is contradicted by those facts which the District Court found were undisputed. 413 F.Supp. at 985 n.2. They include a *Cooperative Marketing Agreement* entered into in May, 1973, under which the members of Central agreed through it (1) to exchange information regarding the status of their crops, and (2) to inspect the condition and quality of their crops, (3) to make no discounts in lieu of brokerage upon the sale of their crops, (4) to sell lettuce within the limits of floor and ceiling prices established by Central, (5) not to ship lettuce which had not been sold or consigned, (6) to report delinquent accounts to Central, (7) to sell lettuce in master containers which identified the lettuce as being sold by a member of Central, and (8) regularly to exchange marketing information with one another. 413 F.Supp. at 986-987. The District Court specifically found "that the primary activity of Central is to set prices or price ranges . . . [*but that the*] *record indicates that Central also engages in other activities related to the marketing of lettuce.*" 413 F.Supp. at 987.

Northern's petition asks this Court to ignore all those marketing activities in which the District Court found Central was indisputably engaged, and to review the decision below on a totally different factual premise for which there is no foundation.

This none too subtle attempt to ignore the facts of this case at this late date is, of course, a response to the clearly correct holding below that, on the undisputed facts, the governing precedents place respondents squarely within the protections given to agriculture by the antitrust laws:

> The *aggregate of activities* of Central constitute "collective marketing" within the meaning of the phrase as defined in *Treasure Valley* [497 F.2d 203 (9th Cir.), *cert. denied,* 419 U.S. 999 (1974)]. Here, as in *Treasure Valley,* Central was "supplying market information and performing other acts . . . involved in the transferring of title" of the produce . . . . Northern tries to distinguish *Treasure Valley* . . . [but it] is a distinction without a difference.

413 F.Supp. at 992 (emphasis added). The facts in the record clearly show that Central is engaged in an "aggregate of activities" which constitute "marketing" in the well-established meaning of that term.

B. Even If Northern's Characterization of the Facts of This Case Is Correct, Respondents Nonetheless Fall Within the Protections Afforded to Agriculture Under the Antitrust Laws.

Although the District Court found that the facts would not support Northern's assertion that Central engaged in no material action other than price fixing, it also reached an alternative holding that *"even if* Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. *It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anti-competitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption."* 413 F.Supp. at 992 (emphasis added). The "statutory protection" which the court found existed was that established by Section 6 of the Clayton Act and by Section 1 of the Capper-Volstead Act.

Section 6 grants immunity from the antitrust laws to "agricultural . . . organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit." 15 U.S.C. § 17. The District Court expressly found that Central satisfied the structural elements of Section 6. 413 F.Supp. at 988-989. Since its requirements are met, Section 6 provides: (1) that "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural associations . . .;" (2) that "nothing contained in the antitrust laws shall be construed . . . to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof;" and (3) that neither "shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17.

As the District Court noted, "Capper-Volstead was enacted to clarify and extend the Section 6 exemptions." 413 F.Supp. at 989 (citing *Case-Swayne Co. v. Sunkist Growers,* 389 U.S. 384, 391 (1967)). It expanded the types of agricultural associations protected under the antitrust laws and enumerated various kinds of activities in which they could properly engage: "processing, preparing for market, handling, and marketing. . . ." 7 U.S.C. § 291.

Northern does *not* argue that Central fails to meet the organizational requirements of Section 6 and Capper-Volstead. What it argues is that Central and Central's members lost the protections of Section 6 and Capper-Volstead because Central did not engage in enough "collective activity." Northern's position is that, where an agricultural cooperative does no more than act as an agency for fixing the prices at which its members will sell, it is not entitled to antitrust immunity; that price fixing is only protected if it is ancillary to other cooperative activities. (Pet. 6-7)

In rejecting Northern's argument, the courts below relied heavily on the leading decision of this Court interpreting Section 6 and Capper-Volstead, *Maryland and Virginia Milk Producers Ass'n v. U.S.*, 362 U.S. 458 (1960). This Court there said:

> Section 1 of the Capper-Volstead Act also provided that among the "legitimate objects" of farmer organizations were "collectively processing, preparing for market, handling, and marketing" products through common marketing agencies and the making of "necessary contracts and agreements to effect such purposes." . . . This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, [and] fix prices at which their cooperative will sell their produce. . . .

362 U.S. at 466. The District Court found that, in using the phrase, "among 'the legitimate objects,'" the above-quoted passage "necessarily implies that (a) Section 6 and Capper-Volstead, although overlapping, are not synonymous, and (b) it is not necessary for a farmer association to engage in all of the enumerated activities to qualify for the exemption." 413 F.Supp. at 991. It further held that "Central's activities are consistent with the purpose of the statutes 'to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce.'" *Id.*, quoting 362 U.S. at 466.[8]

In addition to the precedents of this Court, the courts below relied upon various lower court holdings in reaching their conclusion that *"even if"* Central had done no more than fix the prices at which its members sold their crops, it was entitled to protection under the antitrust laws. In particular, the recent decision in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974), was deemed controlling. *See* 413 F.Supp. at 991. There, the court had held that, though an agricultural cooperative did not process, prepare for market, handle or actually sell the crops of its members, it was entitled to protection under the antitrust laws since its activities did constitute collective marketing. The primary activity of the cooperative was to fix prices for its members' crops. This, held the court, was clearly within the plain meaning of the word "marketing" as used in Capper-Volstead. *Id.* at 497 F.2d 215.

The final element leading to the rejection of Northern's argument, however, was its simple incongruity. In arguing

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[8]The District Court fully examined the legislative history of Capper-Volstead, and noted that Congressman Volstead had described its aim as "to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves" of its provisions. It also quoted Senator Reavis's observation that the legislation would allow a farmer, through cooperation, "to fix the price of the thing that he raises." *See* 413 F.Supp. at 993.

that Central and its members had lost their protection under the antitrust laws because they had only combined to fix the prices of their crops, Northern not only ignored the factual record, but, in effect, argued that Central and its members had lost their protection because they are not anticompetitive enough. Though Northern has never defined how much "collective activity" it thinks a cooperative must engage in before it is entitled to protection, its position that too little collective activity forfeits the protection of the antitrust laws is, quite simply, perverse. Or, in the District Court's words, "ironic and anomalous." 413 F.Supp. at 992.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH ALL RELEVANT PRECEDENTS.

As has previously been pointed out, the Court of Appeals below adopted the District Court's opinion as its own. That opinion, in turn, found controlling the recent decision in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). *See* 413 F.Supp. at 992.

The Court of Appeals also cited in support of its decision the opinion of the Federal Trade Commission in *Central California Lettuce Producers Cooperative, et al.*, Docket No. 8970, July 25, 1977, CCH Trade Reg. Rpts. ¶ 21,337. In the FTC opinion the very activities here challenged, and the same cooperative and its membership, were held to be protected by Capper-Volstead. In response to the argument that Central had not engaged in enough "collective activities", the FTC said, "Congress has manifested no intent to mandate any particular degree of vertical integration as a precondition to Capper-Volstead immunity." At p. 21,235. In response to the argument that price-fixing was not a legitimate cooperative activity, the FTC said, "Whatever 'marketing activity' excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale." At p. 21,237. And in response to the argument that too little cooperative activity forfeits the protection of Capper-Volstead, the FTC said, "Complaint counsel's argument is not strengthened by the anomaly it introduces. . . . [A] cooperative would be hard-pressed to know just what degree of corporate integration would be required to qualify under Capper-Volstead were we to adopt complaint counsel's theory. . . . As the Supreme Court said, in a different context, the Capper-Volstead Act does not lend itself 'to such an incongruous immunity-distinction . . . as that urged here.' " At pp. 21,238-21,239.

The key relevant precedents of this Court are *Maryland and Virginia Milk Producers Ass'n, Inc. v. U.S.*, 362 U.S. 458 (1960), and *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962).[4] In the *Milk Producers* case, as has previously been pointed out, this Court clearly indicated that the specifically enumerated Capper-Volstead "legitimate objects" of an agricultural cooperative were neither an exhaustive listing of "legitimate objects" nor a mandatory organizational chart. And, this Court further indicated, specifically, that one of the purposes of

[4]The recent decision of this Court in *National Broiler Marketing Ass'n v. U.S.*, ... U.S. ... (1978), and Northern's misplaced reliance upon it, is discussed in Section III, *infra*.

the agricultural exemptions to the antitrust laws was Congress's desire to allow farmers to fix the prices of their crops. *See* 362 U.S. at 466. The *Sunkist Growers* decision is directly pertinent to Northern's assertion that protection under the antitrust laws turns upon some magic and undefined formula of integration and cooperation. There, this Court held that "grave legal consequences" should not turn on "organizational distinctions that are of *de minimis* meaning and effect." *See* 370 U.S. at 29.

The three lower court decisions which, other than those decisions already discussed herein, are most clearly relevant to the instant case are *Washington Crab Ass'n,* 66 F.T.C. 45, 105 (1964), *In re Florida Citrus Mutual,* 53 F.T.C 973, 1010 (1957), and *U.S. v. Maryland Cooperative Milk Producers,* 145 F.Supp. 151 (D.D.C. 1956). In all three cited cases it was held that a cooperative organization otherwise entitled to an antitrust exemption did not forfeit that protection simply because its chief, or only, activity was to serve as a vehicle through which its members fixed the prices at which their products would be sold.

Indeed, the only "authority" adduced by Northern in support of its argument that cooperative activity among farmers must include more than price fixing is a three-year-old speech given at a convention in New Orleans by a then Deputy Assistant Attorney General. *See* Pet. 6. Review of the decision below by this Court is clearly not called for to resolve such an illusory "conflict."

III. THIS COURT'S RECENT DECISION IN NATIONAL BROILER MARKETING HAS NO RELEVANCE TO THE ISSUES PRESENTED IN NORTHERN'S PETITION.

In *National Broiler Marketing Ass'n v. U.S.,* ..... U.S. ..... (1978), this Court held that a cooperative which included nonfarmer members could not claim protection under Capper-Volstead. That holding has no impact upon this case since it is the undisputed fact that all of Central's members are actual growers of lettuce. Pet. 3; 413 F.Supp. at 986.

In its Petition, however, Northern cites the concurring opinion of Mr. Justice Brennan in *National Broiler Marketing* and attempts to read into that case a new ground for forfeiture of the protections of Capper-Volstead: "bigness is badness." Specifically, Northern argues that the members of Central are not small, family-held farms, but rather large corporate farms, sometimes corporate subsidiaries of larger corporations. Such farms, says Northern, are not entitled to the protections given to agriculture under the antitrust laws. Pet. 10-11.

Three brief observations should be made about Northern's argument. First, the District Court found, and Northern does not dispute the fact, that the members of Central are all engaged in the actual growing of lettuce. Second, Northern's "bigness is badness" argument was not advanced in its complaint, was not litigated below, has no basis in the record, and is based solely on dicta in a concurring opinion. Third, Northern's now proferred argument is hopelessly at odds with the theory of its case which Northern has all along relied upon and even now advances. Northern contends in one breath that "bigness

is bad", and in the next that Central has forfeited its protection for not being more integrated and assuming more functions which would greatly increase its power and, *a fortiori,* make it more anticompetitive.

Northern would have this Court rewrite the provisions of the antitrust laws governing agriculture on the theory that something called "agribusiness" has no right to their protections. But, the majority of this Court observed in *National Broiler Marketing,* "We may accept the proposition that agriculture has changed in the intervening 55 years [since Capper-Volstead was enacted], but, as the second Mr. Justice Harlan said . . . a statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress, not the courts." ..... U.S. ..... (citations omitted).

As now written by Congress, the protection afforded agriculture under the antitrust laws bears "witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. . . . These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process." *Tigner v. Texas,* 310 U.S. 141, 145-147 (1940). Those who would seek to change the law because of some alleged change in the nature of agriculture should seek appropriate legislative action and not, as here, attempt to have the courts substitute their judgment for that of Congress.

Finally, Northern's "bigness is badness" theory is especially hollow in the context of the present case. As this

Court recognized in *National Broiler Marketing,* the purpose of the antitrust exemptions is to enable food producers "to bolster their market strength" so that they might better deal with the middlemen who stand between them and the ultimate consumers of their crops. ..... U.S. ..... Northern, a retailer of groceries, is such a middleman. Northern controls twenty supermarkets scattered throughout Northern California. 413 F.Supp. at 985. During the time period relevant to this case, Northern was a member of a buyers' cooperative through which it purchased fresh produce, including lettuce. And that cooperative, United Grocers, dealt in over one-third of a billion dollars in merchandise in 1973. (R. 298-299, 553) This is precisely the situation which Congress had in mind when it decided that farmers needed to be given the ability to join together to increase their economic bargaining power.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for a Writ of Certiorari should be denied.

December 7, 1978.

Respectfully submitted,

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No. 78-764

Supreme Court of the United States

OCTOBER TERM, 1978

NORTHERN CALIFORNIA SUPERMARKETS, INC.,

Petitioner,

vs.

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In Petitioner's characterization of the case, we stated that the defendant Cooperative "performs no significant marketing, processing or handling functions as an entity . . ." and that "the only material function of the organization is to fix, set and stabilize the price at which its members individually sell their products" (Petition, p. 2).

Respondents have suggested that the record below shows marketing activity in addition to the setting of prices. We don't disagree. We never suggested that price fixing was the only activity performed by the Cooperative. We did suggest that on this record the District Court was forced to assume that no "significant, or material activity was performed by the Cooperative other than price fixing." (Petition, at P. 5).

However, Respondents have attempted to create the illusion of substantiality for those supplemental activities. In that effort, they looked principally to "Central's purpose" (as set forth in its Articles of Incorporation), and to the fact that in May of 1973, the members of the Cooperative agreed in a "cooperative marketing agreement" to engage in a series of activities other than price fixing.

The record below contains references to the deposition of Paul Fleming, designated by the Cooperative to speak on its behalf pursuant to Federal Rule of Civil Procedure 30(b)(6) (e.g., Transcript — pp. 5-7; 30). The deposition was taken on April 24, 1975, at which time Mr. Fleming was asked questions concerning the list of purposes set forth in the corporate articles. Counsel for Petitioner asked the questions:

> "Q. I am referring now to page one of the articles, paragraph A in the middle of the page, entitled the purpose, the purposes for which the Cooperative was formed are to engage in any activity in the convention of production, marketing, selling of or with the harvesting, growing, processing, canning, packing, grading and storing, handling, shipping or utilization of those products or the manufacturing of by-products from them, or in connection with the manufacturing, selling, or supplying of machinery,

equipment or supplies to its members or in financing the activities enumerated above or in any combination of the activities specified in this article. Did I read that correctly?

"A. Very good.

"Q. Backing through it, then, to your knowledge, has the Cooperative ever been engaged in financing the activities of members?

"A. No.

"Q. Has it been involved in the manufacturing, selling or supplying of machinery, equipment or supplies to its members?

"A. No.

"Q. Has it been involved in manufacturing by-products?

"A. No.

"Q. Has it been involved in harvesting any of the products of its members?

"A. No.

"Q. Preserving the products of its members?

"A. No.

"Q. Drying, processing, canning, packing, crating, storing, handling, shipping or utilizing products of its members?

"A. Not in the effect of establishing marketing policies for the handling and shipping. I would say the members were cooperating — I mean the Co-op is a — the members — and the Co-op dictates the policy by which the materials are going to be handled in shipping.

"Q. But is the Cooperative itself acting as a cooperative handling the products of its members?

"A. No.

"Q. Or shipping?

"A. No.

"Q. Or utilizing the products of its members?

"A. No.

"Q. Or any of the other things that I just read?

"A. No.

"Q. Okay. Does the Co-op acting as the Co-op, engage in the sale of any farm products of its members?

"A. No.

"Q. Does the Co-op, acting as a Co-op, engage in the production of the products of its members?

"A. No.

"Q. Okay.

"A. That just leaves marketing.

"Q. That just leaves marketing. Does the Co-op, acting as a Co-op, engage in any marketing?

"A. Yes.

"Q. What are those functions?

"A. Okay. Basically, setting up advance prices for chain stores and trying to stabilize the price and to prevent the wide fluctuations as we have mentioned before." (Depo. of Paul Fleming, pp. 38-39).

As Mr. Fleming indicated, what the members agreed to do was quite different from what they did once the Cooperative was formed. The activities which were performed were similar to those dealt with in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Here, rail cars selling at distressed prices had a depressing effect on the overall market for lettuce. In *Socony-Vacuum Oil,* spot prices for oil tank cars was the perceived evil which artificially depressed industry prices. In *Socony-Vacuum Oil,* the plan to raise the price of oil involved primarily the elimination of distressed oil from the market through a program of coordinated purchases. The defendants in that case argued their efforts tended only to stabilize a depressed market, and that once stabilization had occurred, competition dictated the price of oil. The Court struck down the "market stabilization" as a *per se* violation of the antitrust laws:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." Id. at 221.

This is not a difficult factual record. Petitioner does not dispute that which everyone knows. In order to fix prices some discussion of market conditions is inevitable. We assumed in the District Court, in the Court of Appeals, and before this Court that some discussion of market conditions occurred at these meetings to fix prices. It was our position in the District Court, and it is our position here, that the record is silent as to any inference that those discussions were anything other than incidental to the

price fixing discussions. The defendants do not dispute that characterization, and the District Court relied on it when it found:

> "Plaintiff and defendants agree the primary activity of Central is to set prices or price ranges to which members are required to adhere in the sale of their lettuce." (Petition, at p. 6a).

Respondents have also argued that our *National Broiler Marketing* argument is misplaced because it was not raised in the Courts below. Obviously, the precise terms of the argument could not have been raised before this Court's decision. However, the fact that this Cooperative was not formed from the types of small farmers which congress envisioned in passing the Capper-Volstead Act was argued before both the District Court and the Ninth Circuit.

The size and vertically integrated nature of the members of the cooperative form part of the undisputed record in this case. (Record Vol. 2, p. 239 *et seq.)* The size of companies such as United Brands may be judicially noticed, and the amount of commerce handled by these Defendants was noted in the opinion below. (Petition, p. 6a).

Consequently, the record below is perfect for the questions originally presented. Defendants' price fixing is neither ancillary to nor a necessary incident of any legitimate collective activity. Defendants do not argue that it is. However, they insist upon immunity from the operation of the Sherman Act. We have demonstrated that no decisional precedent exists for the District Court opinion and no support can be found anywhere in the history of the statutory exemptions.

Both the statutory history of the agricultural exemption and the interpretative cases support the thesis

that price fixing will only be tolerated under circumstances in which it is ancillary to and a necessary incident of an otherwise legitimate collective activity, such as the collective sale of produce. To hold otherwise would be to disembowel the concept of a limited exemption for agriculture and would place this country at the whim of dominant groups of large agricorporations.

This is no group of small farmers. This group controls a significant proportion of the nation's lettuce supply. No effort has been made to disguise their price fixing; Defendants boldly assert that they are entitled to it.

If Defendants' activities ultimately receive sanction, the prospects are terrifying. The formation of large cooperatives which serve no serious function other than to manipulate the price of our food supplies would threaten our basic economic structure, just as it is now threatened by the cooperative actions of OPEC.

Although Defendants may dispute the cause of the price rise, the Federal and State Marketing News Service reported that in the year following the formation of the Defendant cooperative, the price of Salinas Valley lettuce rose by more than 50 percent at the producer level. The prospects of similar price rises in other commodities must be recognized as the probable progeny of the Ninth Circuit decision.

CONCLUSION

The Petition should be granted.

January 3, 1979.

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